

**United States Postal Service and Fayetteville Local  
984 of the American Postal Workers Union.  
Case 11-CA-13553-P**

January 18, 1991

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND RAUDABAUGH

On August 7, 1990, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a motion to strike portions of the Respondent's brief, and the Respondent filed an opposition to the General Counsel's motion.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by coercing an employee whom it suspected of filing unfair labor practice charges with the Board by informing him that he must provide the names of supervisors who had given him supporting affidavits. The judge found that the Respondent had violated the Act essentially as alleged. For the reasons set forth below, we disagree.

On October 5, 1989, Anthony McKinnon, president of the Charging Party as well as an employee of the Respondent, was called into a meeting by the Respondent's director of city operations, Stephen Lee, and its manager of general mail facility Charles Fields.

<sup>1</sup> The General Counsel urges that fns. 11 and 15 of the Respondent's brief, referring to portions of the General Counsel's brief to the judge, be stricken because the General Counsel's brief to the judge is not part of the record in this proceeding. We find no merit in this contention. Those portions of the General Counsel's brief to the judge refer to evidence in the record, which the Board is entitled to, and does, review whether or not the specific evidence is called to the Board's attention by any party. Consequently, the General Counsel is not prejudiced by the Respondent's citation of those passages in its brief. As for the General Counsel's argument that the General Counsel did not, contrary to the Respondent's contentions, misrepresent the record in its brief to the judge, we assure all concerned that our decision is based on our independent review of the record, not on any party's characterization of it.

The General Counsel also moves to strike two letters appended to the Respondent's brief, on the ground that they have not been offered or received in evidence. We find merit in this contention. We also find that the letters, from two of the Board's Regional Directors explaining their decisions to defer charges to the grievance-arbitration procedure, are inapposite to the issues in this case. Accordingly, we grant the General Counsel's motion to this limited extent, and we shall order that the letters and all references to them be stricken from the Respondent's brief.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

According to McKinnon,<sup>3</sup> Lee informed him that "this was an official investigation into allegations that I had affidavits in reference to NLRB charges against the Postmaster."<sup>4</sup> McKinnon responded that he had nothing to say without representation.<sup>5</sup> Lee repeated that this was an official investigation, and showed McKinnon a copy of section 666.6 of the Respondent's employee labor relations manual, which states that "Employees will cooperate in any postal investigation." McKinnon reiterated his request for representation. Lee then called the Respondent's labor relations representative, Luis Martinez, and told him that McKinnon was not cooperating. Martinez arrived a few minutes later and explained to McKinnon that, in an earlier conversation, McKinnon had told Martinez that he (McKinnon) had "affidavits from supervisors and managers stating that they were informed by the Postmaster to harass Union officials and deny grievances," and that these allegations warranted an investigation because they potentially involved the Board.<sup>6</sup> At various times during the meeting, both Lee and Martinez asked McKinnon to provide the names of the supervisors who had been told to harass, or who were harassing, employees, and informed him that section 666.6 required him to cooperate in the investigation. McKinnon, however, did not cooperate. Instead, he requested representation (which, according to McKinnon, was denied); he then repeated that he had nothing to say. The meeting was then concluded. There is no evidence that McKinnon was ever threatened<sup>7</sup> or retali-

<sup>3</sup> There are numerous discrepancies in the testimony of the witnesses concerning exactly what was said at the October 5 meeting. The judge did not resolve those discrepancies, nor did he broadly credit or discredit any of the witnesses who were present at the meeting. Our analysis, therefore, is based on testimony that was either un rebutted, substantially consistent, or (in light of our finding below that no violation occurred) most favorable to the General Counsel's case.

<sup>4</sup> There is no evidence that such affidavits existed or that such charges were filed.

<sup>5</sup> McKinnon testified that he asked for his attorney but that his request was denied. The Respondent's witnesses who attended the meeting testified that McKinnon did not ask for his attorney, and Lee claimed that he told McKinnon he could have another union official, a steward, or anybody he wanted. Although the judge did not resolve this testimonial discrepancy, and although McKinnon never received the assistance of a representative at the meeting, we note that there is no allegation that McKinnon was deprived of his rights under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

<sup>6</sup> McKinnon also testified that he had informed Martinez earlier on October 5 that it was the Respondent's supervisors' fault that Martinez was dealing with a lot of grievances, and that if the supervisors continuously harassed shop stewards and union members and denied the stewards time to process grievances, the Union had no choice but to go through the grievance procedure.

Martinez testified that, in their private conversation, McKinnon alleged that supervisors had told him that they had been told by Postmaster Jeff Martin to harass employees. According to Martinez, when he asked for the names of the supervisors so the allegation could be checked out, McKinnon refused, but said that he had supervisors who would give affidavits to the Board if the Board were to come and investigate. It apparently was this conversation between Martinez and McKinnon that triggered the investigation later on October 5.

<sup>7</sup> We find that Lee's and Martinez' informing McKinnon that he was required to cooperate in the investigation was not specific enough to constitute a threat. McKinnon testified that after he refused to cooperate, Fields said to Lee, "Let's go ahead and do what we originally discussed." The judge found

*Continued*

ated against for his failure to cooperate in the investigation,<sup>8</sup> which the Respondent abandoned.

Unlike the judge, we do not find that the Respondent acted coercively toward McKinnon on October 5. Although there may be times in which the Respondent's invocation of its rule that employees must cooperate in postal investigations would be coercive,<sup>9</sup> the meeting with McKinnon was not such a time. In the first place, as the judge recognized, the Respondent had a legitimate interest in investigating McKinnon's allegation that supervisors had been ordered to harass employees and union officials. The information sought by Lee, Fields, and Martinez had nothing to do with the union sentiments of McKinnon<sup>10</sup> or any other employee. Indeed, McKinnon was not asked for the names of employees or union officers who might have complained of harassment, but only for the names of (presumably statutory) supervisors who assertedly had been told to engage in harassment. If anything, the Respondent's investigation would seem to have been for the benefit of McKinnon and the unit employees. And, as we have noted, McKinnon was neither threatened nor retaliated against for his refusal to cooperate in the short-lived investigation.<sup>11</sup> On the basis of all the foregoing, we find, contrary to the judge, that the Respondent's interrogation of McKinnon was not unlawful,<sup>12</sup> and we shall dismiss the complaint.<sup>13</sup>

that this statement was inconclusive and that it was not an unlawful threat. No party has excepted to this finding.

The judge credited the testimony of Union Secretary Harold White that on October 10, 1989, Martinez threatened to use certain grievances as the basis for filing suit against McKinnon. It appears, however, that Martinez' ire was raised by what he considered a high volume of frivolous grievances that dealt with requests for information by the Union, and not by McKinnon's refusal to cooperate in the meeting 5 days before. In addition, there is no evidence that this threat was communicated to McKinnon. Thus, although White did allude to the October 5 meeting in his discussion with Martinez, nothing in that discussion constituted a threat to McKinnon that was related to the subject matter of this case. (The complaint did not allege, nor did the judge find, that Martinez' remarks constituted a separate violation of the Act, and no party has excepted to the judge's failure to find a violation in this regard.) In any event, the judge's finding that "the comments made by Martinez were unspecified threats of retaliation" is somewhat ambiguous, because Martinez made numerous remarks. From the context of the judge's discussion, however, we conclude that he was referring only to Martinez' statements to White, and not to any of his remarks on October 5.

<sup>8</sup>Fields testified that McKinnon told Fields at some point during the meeting that he assumed he would be fired or suspended, and that Fields replied that that was ridiculous, and that the Respondent only wanted to find out if McKinnon's allegations were true. McKinnon did not testify in rebuttal concerning this conversation with Fields.

<sup>9</sup>The rule itself is not alleged to be unlawful.

<sup>10</sup>In any case, the union sentiments of McKinnon—the president of the local—could have been inferred by the Respondent with reasonable accuracy.

<sup>11</sup>Unlike the judge, we find no significance in McKinnon's mentioning alleged harassment of union officials, as distinct from other employees.

<sup>12</sup>*Rossmore House*, 269 NLRB 1176 (1984), enf'd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

<sup>13</sup>The complaint does not appear to allege that, in their private conversation on October 5, Martinez coerced McKinnon by simply asking him for the names of supervisors who allegedly had been told to harass employees, and there is no evidence that Martinez invoked sec. 666.6 or otherwise indicated to McKinnon that he was required to furnish the supervisors' names. Accordingly, Martinez' actions on that occasion were even less at odds with McKinnon's Sec. 7 rights than were the actions of Lee, Fields, and Martinez later that day, which we have found not to have been unlawful.

## ORDER

The complaint is dismissed.

IT IS FURTHER ORDERED that exhibits A and B to the Respondent's brief, and all references to those exhibits, be stricken from the Respondent's brief.

*Donal R. Gattalaro, Esq.*, for the General Counsel.

*Jesse L. Butler, Esq.* and *Robert Sindermann Jr. Esq.*, of Washington, D.C., for the Respondent.

## DECISION

### STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on May 14, 1990, at Fayetteville, North Carolina. The hearing was held pursuant to a complaint issued by the Regional Director of Region 11 of the National Labor Relations Board (the Board) on December 1, 1989. The complaint is based on an amended charge filed by Fayetteville Local 984 of the American Postal Workers (the Charging Party or the Union) on November 24, 1989. The complaint alleges that the United States Postal Service (the Postal Service or the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by coercing its employee whom it suspected of filing unfair labor practice charges with the National Labor Relations Board by informing the employee that he must provide the names of supervisors who had given him supporting affidavits. Respondent has by its answer filed on January 4, 1990 denied the commission of any violations of the Act and has asserted as an affirmative defense that those matters in dispute are properly raised under the collective-bargaining agreement and that the matter should be deferred to the grievance-arbitration procedure established in article 15 of its 1987–1990 National Agreement.

On the entire record in this proceeding, including my observations of the witnesses who testified herein, and after due consideration of the briefs filed by the General Counsel and Counsel for the Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

##### A. *The Business of Respondent*

The complaint alleges, Respondent admits, and I find that the Respondent provides postal service for the United States of America and operates various facilities throughout the United States in the performance of that function, including its facility in Fayetteville, North Carolina, the only facility involved in this proceeding, and that the Board has jurisdiction over Respondent and this matter by virtue of section 1209 of the Postal Reorganization Act.

##### B. *The Labor Organization*

The complaint alleges that the Union, is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act. In its answer the Respondent denies this allegation but contends that Local 984 is only a limited agent of the American Postal Workers Union, a labor organization, pursuant to article 15, 1987–

1990 National Agreement for the purposes of the filing and processing of grievances 30 through Step 2 at the Fayetteville, North Carolina facility. Based on these limited admissions and on the evidence at the hearing I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

The General Counsel presented the testimony of the Local 984's president Anthony McKinnon, who is also an employee of Respondent, that on October 5, 1989, he was called to a meeting by Acting City Operations Manager Stephen Lee and Acting Manager of Mail Processing Charles Fields. McKinnon testified as follows: Lee told him "that this was an official investigation into allegations that I had affidavits in reference to National Labor Relations Board charges against the Postmaster." McKinnon told them he had nothing to say without representation and Lee then repeated that this was an official investigation and handed him a copy of section 666.6 of the Employee Labor Relations Manual. McKinnon repeated that he needed representation and Lee then telephoned Louis Martinez who is the labor relations representative for Respondent and said McKinnon was refusing to cooperate. During this brief meeting Fields said, "Let's go ahead and do what we originally discussed." Shortly thereafter Martinez arrived and McKinnon asked him what was "going on." Martinez explained that in an earlier conversation between Martinez and McKinnon, McKinnon had stated that he "had affidavits from supervisors and managers stating that they were informed by the Postmaster to harass Union officials and deny grievances." Martinez stated that since the allegations were of such a nature because they were going to the National Labor Relations Board, they warranted an investigation. McKinnon asked for representation and was asked who he wanted whereupon he requested his attorney and this request was denied. McKinnon then repeated that he had nothing to say. Either Lee or Martinez referred again to section 666.6 of the employee manual and Fields repeated his earlier question, to Lee, that they do what they discussed earlier. Earlier in the day McKinnon had passed by Martinez' office and noticed he had a lot of grievances and stuck his head in and said you look like you're busy, to which Martinez replied, "Yes, [it's] your fault that I'm busy." McKinnon replied "it's not my fault, it's your supervisors' fault" and "I said if they continuously harass our shop stewards, deny them grievance time, harass the membership, I said we have no choice but to go through the grievance-procedure."

The General Counsel also called Harold White, who is the secretary of the Union and who testified as follows to a conversation with Martinez on October 10, 1989: Martinez asked him why McKinnon was sending out a letter to Jeff Martin, the 30 postmaster of the Fayetteville Postal Branch and why the Union was filing grievances. White replied that as a union official McKinnon had a right to file grievances. Martinez told him the grievances were foolish and that White should talk to Shop Steward Frank King. White refused to talk to McKinnon and referred to the incident of October 5 when McKinnon was called into the office. After that, Martinez asked White to accompany him to the secretary's office, which he did, and Martinez picked up 10 or 11 of the grievances and said these are all foolish grievances and that

McKinnon was asking for something Respondent had already given the Union. White replied that the grievances were the result of Respondent's failure to supply information. Martinez and White then went outside the office and Martinez said he was going to take these grievances and send a letter to the Postmaster General and named other officials and said "We're going to file suit against Tony [McKinnon] and I'm going to use these grievances to do it." White replied this was wrong and that "it was wrong for them to pull Tony into the office." Martinez replied, "it ain't over yet."

Respondent called four witnesses: Kay Smith, the secretary to the Postmaster, Lee, Fields, and Martinez. Smith testified as follows: On October 5, 1989, about 4 p.m. McKinnon came into her office to use her date stamp to stamp grievances. In casual conversation she commented on the large number of grievances. McKinnon replied he had 15 today but would file 60 tomorrow and that "as long as Martinez keeps telling the supervisors on the floor to harass the employees they're going to still come." McKinnon then handed her the grievances and left. She telephoned Martinez and told her there were some grievances for him to pick up. Martinez came in and told Postmaster Jeff Martin about a conversation he had with McKinnon and that McKinnon had said that "Martin was asking the supervisors on the floor to harass the employees." She then said "[n]o Louis. He said you were told to harass the employees."

Labor Relations Representative Louis Martinez testified as follows: About 4 p.m. on October 5, 1989, he was sitting at his desk and McKinnon came to his door and they exchanged pleasantries and Martinez said he had heard that McKinnon had filed 15 grievances. McKinnon replied in the affirmative and said 60 more would come in the next day. Martinez asked McKinnon what the problem was and McKinnon said as long as supervisors were told to harass employees, Martinez would continue to receive grievances. Martinez asked McKinnon what he meant and McKinnon said that supervisors had come to him and told him that Fayetteville Postmaster Jeff Martin had told them to harass employees. Martinez asked McKinnon for the names of the supervisors and told him these were serious allegations and if McKinnon would give him the names it could be checked out. McKinnon refused to give him the names and Martinez told him he did not believe the allegations. McKinnon replied, "I've got supervisors that if the Labor Board were to come down here that they would give affidavits to the Labor Board and the Labor Board would make sure that there was something in there where Jeff Martin couldn't retaliate against these supervisors." Martinez asked again for the names of the supervisors, but McKinnon refused to provide them. Following this conversation he went to Martin's office and discussed the matter with him. Martin denied having told supervisors to harass employees. Smith then told Martinez that McKinnon had told her that he (Martinez) was the one that had told supervisors to harass employees.

Martinez testified further that he and Martin decided to conduct an "official investigation." He and Martin decided to call Steve Lee, the director of city operations, and Martin asked Martinez to make copies of section 666.6 of the Employee Labor Relations Manual which states "Employees will cooperate in any postal investigation." When Lee arrived in Martin's office they apprised him of what had transpired and Martin asked him to conduct an official investiga-

tion. Manager of the general mail facility, Charles Fields, came in toward the end of the conversation and Fields and Lee then left to speak with McKinnon. The supervisors and floor superintendents report to Fields and Lee. Shortly thereafter Martinez received a call from Lee who told him that McKinnon "was refusing to cooperate and that he wanted some representation." Martinez told him to give him whatever representation he wanted. Four or 5 minutes later he received another phone call from Lee who asked him to come to his office. On his arrival in Lee's office he told McKinnon of section 666.6 of the Employee Labor Relations Manual and asked for the supervisors' names again and McKinnon then went into another subject alleging that the stewards were not getting enough time to discuss grievances. The meeting was then concluded. In his discussion McKinnon had not asked for an attorney. No further action was taken by Martinez or the Respondent concerning the investigation and no subsequent grievances were filed by the Union concerning alleged harassment by the supervisors. With respect to the alleged conversation between White and himself, Martinez denied that the conversation ever took place and specifically denied having made the comments attributed to him by White.

Director of City Operations Stephen Lee testified as follows: On October 5, 1989, he was called to Martin's office and apprised of the allegations that his supervisors were harassing employees and it was concluded that an investigation was warranted. He returned to his office with manager Fields and he called McKinnon to his office. When McKinnon arrived, he told him this was an official investigation based on allegations he had made to Martinez that he had supervisors harassing employees and "I instructed him to give me the names of the supervisors that were harassing the employees." McKinnon refused to give him the information and Lee then handed him a copy of the Employees Labor Relations Manual, section 666.6 and again told him this was an official investigation and that he was obligated to cooperate with the investigation. Lee again asked for the names and McKinnon pleaded the fifth amendment.

Lee then called Martinez on the phone and in the presence of McKinnon told him that McKinnon was refusing to cooperate. During this conversation McKinnon proceeded to name union officials and Lee told him he needed the supervisors' names. McKinnon then asked for representation and Lee told him "he could have anybody that he wishes, another union official or a steward." McKinnon then was quiet and Lee suspended the discussion and called Martinez to the meeting. McKinnon did not ask for an attorney. When Martinez arrived he informed McKinnon that this was an official investigation and either Martinez or Lee told McKinnon they need to know the names of the supervisors. At that time McKinnon changed the subject to insufficient grievance time for union stewards. At no time during the conversation did McKinnon state he had statements from supervisors alleged to have been instructed to harass employees. During this meeting McKinnon did not state that he had gone or was going to the Board or otherwise refer to a Board charge. At the conclusion of the discussion he told McKinnon to return to work.

Charles Fields, the manager of the general mail facility, corroborated the testimony of Lee concerning the meeting with McKinnon and also testified that at one point

McKinnon told Fields that he assumed he was going to fire or suspend him, to which Fields replied this was ridiculous and that they just wanted to find out whether the allegations were true. Fields denied having made the statement to Lee, "Let's just go ahead and do what we had talked about." Both Lee and Fields denied hearing any mention of the Board by Martinez during the meeting with McKinnon.

McKinnon testified on rebuttal and denied having pleaded the fifth amendment.

#### Analysis

Initially, I find that the Regional Director properly refused to defer this matter to the parties contractual grievance procedure as it does involve the resolution of an issue concerning access to Board process. *Roadway Express*, 274 NLRB 357, 369 (1985), citing *McKinley Transport.*, 219 NLRB 1148, 1151 (1975). Assuming arguendo the testimony of Martinez to be true that McKinnon had stated only that statements for the Labor Board could be obtained from supervisors who had been told to harass employees, this raised a presumption that the supervisors had reported this to union officials. While Respondent obviously had a legitimate interest in investigating this matter the Respondent's interest in obtaining the names of supervisors who had allegedly been told to harass employees did not justify the coercive manner in which it attempted to obtain the names of the supervisors who were allegedly willing to give affidavits to the Board in support of the charge. Moreover, I find that at some point in the initial conversation between McKinnon and Martinez that McKinnon did mention the harassment of union officials as he testified. The testimony of Fields is particularly illuminating on this point concerning the meeting of Lee and Fields with McKinnon as follows:

We had been told that allegations had been made that supervisors on the floor had been instructed by the Postmaster to harass the employees, *the Union officials*. [Emphasis added.]

Thus I find that although McKinnon may have complained about the harassment of employees generally, he was also complaining about the harassment of union officials. This is also supported by the undisputed testimony that he complained in the October 5 meeting with Lee and Fields and Martinez about union stewards not being allowed enough time to handle grievances. I further find that the atmosphere in which McKinnon was called into the October 5 meeting with Lee and Fields, presented with a copy of the paragraph of the manual regarding "official investigations" and told he must cooperate, and repeatedly asked to identify the supervisors by Lee and then by Martinez who was subsequently called in by Lee was inherently coercive and violative of the Section 7 rights of a union official and of the employees he represented. I further find that the testimony of White is credible and that the comments made by Martinez were unspecified threats of retaliation. I find the comment attributed by McKinnon to Fields, why don't we do what we talked about is inconclusive and do not find it to be an unlawful threat. Accordingly I find that Respondent violated Section 8(a)(1) of the Act by coercively insisting that Union President Anthony McKinnon provide the names of supervisors who were willing to provide affidavits to the Board of orders

given to supervisors to harass union officials and employees. *Medallion Kitchens v. NLRB*, 806 F.2d 185 (8th Cir. 1986), enfg. 275 NLRB 58 (1985).

#### CONCLUSIONS OF LAW

1. The Board has jurisdiction over the Respondent United States Postal Services by virtue of Section 1209 of the Postal Reorganization Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

3. The Regional Director for Region 11 properly refused to defer this case to the parties contractual grievance procedure.

4. Respondent violated Section 8(a)(1) of the Act by coercing its employee Anthony McKinnon by insisting he pro-

vide it with the names of supervisors who were willing to provide affidavits to the National Labor Relations Board concerning alleged orders to harass union officials and employees.

5. The above unfair labor practice has the effect of burdening commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondent has violated the Act, it shall be ordered to cease and desist therefrom, and to take certain affirmative actions, including the posting of an appropriate notice, designed to effectuate the purposes of the Act.

[Recommended Order omitted from publication.]